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Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 2008

ROBERT L. SCHULZ, et al.,

Petitioners,

- against -

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, by sanctioning a summary judgment that was granted without a trial, where there are facts material to the case that were in genuine dispute.

2. Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

3. Whether Rule 41(c) of the Federal Rules of Appellate Procedure provides an automatic stay of the enforcement of an opinion and order of a Court of Appeals, until such time as that Court issues the Mandate.

4. Whether the free public distribution of copies of a Petition to the Government for Redress of Grievances, which the Government refused to respond to, and which speech neither advocates nor incites lawless behavior, imminent or otherwise, is protected from retaliation by the Speech, Assembly and Petition clauses of the First Amendment and by the Ninth Amendment to the United States Constitution.

PARTIES

(A) Parties Before The District Court:

The caption contains the names of all the parties.

There were no Intervenors or Amici before the District Court.

(B) Parties In The United States Court of Appeals for the Second Circuit:

The caption contains the names of all the parties.

There were no Intervenors and one Amici before the Circuit Court: Thurston Paul Bell, 121 Manor Way, Apartment H, Louisville, TN 37777.

(C) Parties In The Petition for Writ of Certiorari to the United States Supreme Court:

The caption contains the names of all the parties.

With regard to the two corporate Defendants, the We The People Foundation for Constitutional Education, Inc., and the We The People Congress, Inc., both are not- for- profit corporations, neither has a parent company and neither has issued any stock.

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The Opinion of the Court of Appeals, dated February 22, 2008, affirming summary judgment is reported as United States v. Schulz, et al., 517 F.3d 606 (2nd Cir. 2008) and appears in Appendix A to this Petition.

The Decision and Order of the District Court for the Northern District of New York, dated August 9, 2007, granting summary judgment is reported as United States v. Schulz, et al., 529 F. Supp. 2d 341, and appears as Appendix B to this Petition.

The unpublished Order of the Court of Appeals, dated June 2, 2008, denying motion to vacate Contempt Order appears in Appendix C to this Petition.

The unpublished written opinion of the Northern District of New York, dated April 28, 2008, granting motion for contempt appears in Appendix D to this Petition.

The unpublished Orders of the Court of Appeals, dated June 9, 2008 and August 7, 2008, denying rehearing appears in Appendix E and Appendix F to this Petition.

The unpublished Order of the District Court, dated July 25, 2007, denying leave to file a Sur-Reply appears in Appendix G to this Petition.

The unpublished Order of the District Court, dated August 23, 2007, denying reconsideration appears in Appendix H to this Petition.

The unpublished Order of the Court of Appeals, dated August 30, 2007, granting a temporary injunction appears in Appendix I to this Petition.

The unpublished Order of the Court of Appeals, dated Sept 20, 2007, granting a preliminary injunction pending appeal appears in Appendix J to this Petition.

The unpublished Order of the Court of Appeals, dated April 24, 2008, denying leave to include transcript of oral argument in Petition for *en banc* rehearing appears in Appendix K to this Petition.

The Mandate issued by the Court of Appeals, dated August 27, 2008, for the Court's February 22, 2008 opinion and order appears in Appendix L to this Petition.

JURISDICTION

The Court of Appeals Opinion affirming the permanent injunction and summary judgment was filed on February 22, 2008. A timely Petition for Rehearing was filed on April 7, 2008. The Court of Appeals denial of the Petition for Rehearing was issued on June 9, 2008 and is set forth in Appendix E.

The Court of Appeals Order regarding the Contempt Order was filed on June 2, 2008. A timely Petition for Rehearing was filed on June 10, 2008. The Court of Appeals denial of the Petition for Rehearing was issued on August 7, 2008 and is set forth in Appendix F.

This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1257.

FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Federal Rules of Civil Procedure Rule 56 (c) reads: "**The [summary] judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.**" See Appendix M for the full text of Rule 56.

2. Federal Rules of Appellate Procedure Rule 41c reads: "**The mandate is effective when issued.**" See Appendix N for the full text of Rule 41.

3. The First Amendment to the United States Constitution reads: "**Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.**"

4. The Fourth Amendment to the United States Constitution reads: "**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the**

place to be searched, and the person or things to be seized."

5. The Fifth Amendment to the United States Constitution reads: **"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."**

6. The Ninth Amendment to the United States Constitution reads: **"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the People."**

7. The Internal Revenue Code, 26 U.S.C. Sections 6700 and 6701. See Appendix O for the text of each.

STATEMENT OF THE CASE

A. OVERVIEW

On March 15, 2003, Petitioners Petitioned officials of the United States for Redress of Grievances to reconcile well-documented discrepancies between the statutory requirements of the Internal Revenue Code and the United States'

institutionalized practice of forced withholding of pay by companies from workers' paychecks.

The Petition for Redress consisted of a letter dated March 15, 2003, from Petitioners to the federal officials, along with a blue colored folder labeled "Legal Termination of Tax Withholding for Companies, Workers and Independent Contractors." The Blue Folder contained a memo from Petitioners to Chief Executive Officers, Forms labeled WTP Form #1 through WTP Form #7, and Petitioners' Statement of Facts and Beliefs. A copy of the 100 plus pages that comprised the Petition for Redress is included at (A 295-407)[1] and (Docket # 23).

The obvious purpose of the material was to obtain a legal review of the material, either by the Government or by private tax professionals. For instance, the letter asked the federal officials to review the content of the Blue Folder for accuracy. The memo asked the CEOs to submit the material to a "rigorous review" by their corporate "tax attorneys, CPA's and accountants." The Forms themselves, designed for worker to submit to their companies, included requests to have tax professionals review the material for accuracy.

The federal officials did not respond. Petitioners distributed 3500 copies of the Blue Folder, free of charge, at 37 free, public meetings in the spring of 2003. They posted the entire content of the Blue

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[1] The letter "A" followed by a number refers to page numbers in the Appendix that accompanied the Brief to the Second Circuit on Behalf of the Defendants.

Folder on their website for anyone to download and print, free of charge. Petitioners attached appropriate disclaimers to the material.

On April 2, 2007, the United States filed this case seeking to permanently prohibit Petitioners from distributing the Blue Folders. The United States claimed Petitioners were promoting an "abusive tax shelter." The United States requested an order directing Petitioners to turn over the names, addresses, telephone numbers, email addresses and social security numbers of all people who received a copy of the material. The United States sought permanent injunctive relief "pursuant to the Court's inherent equity powers" and sections 7402 and 7408 of the Internal Revenue Code, as conduct subject to penalty under section 6700 (promoting an abusive tax shelter), and "any other penalty provision in the Internal Revenue Code."

Petitioners filed a motion to dismiss for failure to state a claim for which relief could be granted under the First and Ninth Amendments to the United States Constitution, and failure to state a claim for which relief could be granted under Section and 6700 and 6701.

The United States moved for a Summary Judgment based on a Statement of 21 material facts. (Appendix P).

Petitioners opposed, denying each of the 21 material facts, disputing 42 other facts the United States had included in its pleadings, and including 65 material facts that Petitioners alleged were not in dispute. Petitioners supported their version of the

facts with substantial and significant documentary evidence. (Appendix Q and R).

The United States filed a reply, denying Petitioners' version of the 42 "other" facts. (Appendix S).

Petitioners moved for permission to file a Sur-Reply on the ground that the Reply included a new argument. The Government did not oppose, but the District Court denied the motion. (Appendix G).

Without a trial, discovery or a hearing the Court granted summary judgment. Paragraph "c" of the Summary Judgment directed Petitioners to turn over to the United States the names, address, phone numbers, email addresses, and social security numbers of the people who received a copy of the subject material from Petitioners. (Appendix B).

Petitioners filed a motion for Reconsideration on the ground that the Court failed to construe the evidence in the light most favorable to Petitioners as required by Rule 56 and that the Order was violative of Rule 56 (c) due to the presence of facts material to the case that were in genuine dispute, requiring a trial. Petitioners provided the Court with additional supporting evidence disputing the Court's unsupported finding of harm and imminent lawless behavior. Petitioners moved for a stay pending appeal.

The Court denied reconsideration and directed the Clerk not to include in the record but to return

to Petitioners the evidence disputing the Court's finding of harm and incitement of lawless behavior. The Court denied the motion for a stay pending appeal. (Appendix H).

Petitioners moved for a narrowing of the Order and for an enlargement of the time to comply with the terms of the Order to allow Petitioners time to apply to the Second Circuit for a stay pending appeal. The Court denied Petitioners' motions.

The Court of Appeals granted Petitioners a temporary stay of enforcement of paragraph "c", pending a hearing by a motions panel. (Appendix I).

The motions Panel granted Petitioners a stay of enforcement of paragraph "c" pending the appeal. (Appendix J).

On February 4, 2008, at oral argument, the merits panel did not allow argument on the merits from either Petitioners or the United States. Instead, the two members of the panel present in the courtroom questioned Petitioner Schulz on matters immaterial to the case – i.e., if he receives any money, where he receives his money from and whether he pays federal taxes on that money. Then, a panel member demanded answers from the attorney representing the United States why this case was a civil case, not a criminal case. He all but insisted that the attorney for the United States go back to his client (the Internal Revenue Service) to arrange for a criminal action against Petitioners. See Appendix T for a copy of the transcript.

On February 22, 2008, "for substantially the reasons set forth in the district court's decision," the merits Panel affirmed the judgment, vacating the stay of enforcement its paragraph C saying "the district court found that defendants' illegal activities were harming individuals, who were exposing themselves to criminal liability by following the defendants' ill-conceived instructions...Requiring defendants to provide the identity and contact information of the recipients of the tax materials enables the government to monitor the defendants' obligation under the injunction to provide a copy of the district court's order to recipients of the tax materials. Moreover, the district court found that the defendants' illegal actions were harming the government, which was not receiving required tax payments and was forced to expend resources to collect the unpaid taxes... Requiring defendants to provide the identity and contact information of the recipients of the tax materials enables the government to monitor whether the recipients of defendants' materials are violating the tax laws. Thus we find no abuse of discretion with respect to the district court's imposition of the reporting requirements in Paragraph C of the injunction." (Appendix A).

Petitioners filed a timely Petition for *En Banc* Rehearing, a motion to include a transcript of the oral argument and a precautionary motion for a stay of enforcement of *paragraph "C"* pending rehearing.

The United States filed a motion with the district court to hold Petitioners in contempt for failure to comply with *paragraph* "C".

Petitioners requested a withdrawal of the motion for contempt on the ground that no Rule 41 Mandate had been issued finalizing the Second Circuit's February 22 judgment or order, the obligation of the parties becomes fixed only when the Mandate issues, Petitioners had filed a precautionary motion for a stay of the enforcement of paragraph "C" pending the completion of the appeals process, and the Second Circuit retains jurisdiction over the case until the Mandate issues.

The panel of judges who conducted the oral arguments denied Petitioners' motion to include the transcript of the oral argument and to stay *paragraph* "C." (Appendix K).

The district court entered an Order holding Petitioners in contempt for not complying with *paragraph* "c". Petitioners were ordered to pay $2,000 per day, retroactive to April 28, if they did not comply with *paragraph* "c" by 4:00 p.m., May 5, 2008. In addition, Petitioners were ordered to pay $2,000 per day, from May 5 through May 12 if they did not comply with paragraph "c" by May 12. In addition, Petitioners were threatened with additional coercive sanctions, including incarceration if they did not comply by May 12. Finally, Petitioners were ordered to pay the United States' costs associated with filing and prosecuting the motion for contempt. (Appendix D).

Under duress, Petitioners complied with *paragraph* "c", turning over to the United States the names and addresses of 225 people known to have received a copy of the Blue Folder.

Petitioners filed a motion with the Second Circuit to vacate the district court's April 28 contempt order on the ground that Petitioners had, in good faith, filed a Petition for Rehearing, that no Mandate had been issued finalizing the Second Circuit's February 22, 2008 judgment or order, that the obligation of the parties becomes fixed only when the Mandate issues, that a stay of the enforcement of paragraph "C" had been pending since April 7, 2008, that the Second Circuit retains jurisdiction over the case until the Mandate issues and the District Court cannot proceed in interim.

Without explanation, the Second Circuit denied Petitioners' motion to vacate the contempt order (Appendix C).

On June 9, 2008, the Second Circuit denied Petitioners' petition for a rehearing of the Court's February 22, 2008 opinion regarding summary judgment. (Appendix E).

On June 10, 2008, Petitioners filed a Petition for En Banc Rehearing of the Second Circuits' June 2 order on the ground that Petitioners had, in good faith, filed a Petition for Rehearing of that Court's February 22, 2008 decision, that no Mandate had been issued finalizing the February 22 judgment, that the obligation of the parties becomes fixed only when the Mandate issues, that a stay of the

enforcement of paragraph "C" had been pending since April 7, 2008, that the Second Circuit retains jurisdiction over the case until the Mandate issues and the District Court cannot proceed in interim..

On August 7, 2008, the Second Circuit denied Petitioners' petition for a rehearing. (Appendix F).

On August 27, 2008, the Second Circuit issued the Mandate finalizing the Court's February 22, 2008 judgment and order. (Appendix L).

B. STATEMENT OF FACTS

The Complaint is against WTP Forms WTP Forms 1-7. These Forms rely on and directly quote relevant statutes, regulations and court decisions. (Appendix R).

The Withholding Petition was clearly *earmarked* for review by the United States and/or tax professionals, with the stated goal being the termination of wage withholding as and ***if provided for under U.S. tax law***.

Receiving *no response* from the Government, Petitioners posted the entire contents of the Blue Folder on their website, allowing anyone to download and print the entire Petition *for free*. Petitioners included a NOTICE & DISCLAIMER with each document that read:

NOTICE & DISCLAIMER

"The materials presented herein contain legal content referencing and directly citing official U.S. tax statutes, tax regulations and federal court decisions regarding the limited authority of the U.S. Government to impose income taxes or withholding, and the legal duties and obligations (or lack thereof) that are allegedly imposed upon American businesses and the Americans that labor for them.

These materials are presented solely for educational purposes. Although these materials may be used in attempting to secure and exercise one's Constitutionally protected Rights, including the First Amendment Right to Petition the government for Redress of Grievances, We The People make NO representation that these materials constitute legal advice and furthermore specifically encourage all workers and business owners to submit these materials to qualified legal counsel for review and advice.

WTP has made every effort to provide these materials at **NO COST.**" (Emphasis in original).

See Schulz Declaration #1, Exhibit C. (Docket 12).

During April and May of 2003, Petitioners distributed, free of charge, 3,500 copies of the Petition at 37 free public meetings. (Schulz Declaration #1). Docket 12).

In advance of each of the 37 meetings, Petitioners formally NOTICED the appropriate United States officials of the date, time and location of each of the meetings, requesting that someone from the Government attend the meeting and advise Petitioners if anything they were doing or saying was false or misleading. *At no time did the*

Government ever respond to any of the 37 NOTICES. Copies of the 37 notices are included in the record. (Schulz Declaration #1, Exhibit F). (Docket 12).

Four years later, on March 30, 2007, with permits from the National Park Service and the District of Columbia Police Department, Petitioners led the third in a series of demonstrations in front of the White House in support of the subject Withholding Petition and other Petitions for Redress of Grievances. The next day, March 31, 2007, the *Washington Post* ran a photo of the demonstration and an article titled, "Agitating for the First Amendment." On April 2, 2007, just days after the demonstration outside the White House, the United States filed the instant case.

Notwithstanding the genuine dispute over material facts, especially the facts relating to the gravity of the government's harm, imminent incitement, the truth of the statements under attack and the commercial nature of the speech, the District Court adopted the United States' version of the facts and rejected Petitioners' version, as evidenced by its Order of August 9, 2007 granting Summary Judgment. (Appendix B herein).

What follows are some of the facts included in the District Court's Decision and Order that are in genuine dispute.

MATERIAL FACT IN GENUINE DISPUTE. Nowhere does the material in Petitioners' Blue Folder use the words, "Tax Termination Program." (District Courts

Order at page 2). The United States has admitted that the words "tax termination package" do not appear in Petitioners' materials. See Appendix Q herein, Fact 24. (Docket 21).

The Blue Folder does not counsel individual tax payers to do anything but ask the companies they work for to submit certain written material to a "rigorous review" by their "tax professionals (attorneys, CPAs and accountants) to determine if it is legal for the company to stop withholding, filing and paying to the IRS certain monies withheld from the paychecks of the workers.

The District Court's Decision quoted and relied heavily on the legal principles set forth in *U.S. v Raymond*, 228 F.3d 804, and likened Petitioner's Petition materials to Raymond's "De-Taxing America Program." However, unlike the "De-Taxing America Program", Petitioner's material does not include forms and instructions to guide anyone "through a process of 'de-taxing.'" *Raymond* at 807. Nor does Petitioners' material inform anyone "that if they complete the materials and directions in the Program they will be 'withdrawn' from the jurisdiction of the federal government's taxing authorities and the social security system and will no longer be required to pay federal taxes." *Raymond* at 807. Nor do Petitioners provide materials that are "pre-printed with the purchaser's name and various personal information" to be sent to "various government agencies, including the Internal Revenue Service ('IRS')." *Raymond* at 807. Nor does Petitioners' material suggest, much less instruct anyone to "file W-4 forms with their employers asserting that they are exempt from

federal taxation." *Raymond* at 807. Nor does Petitioners' material suggest, much less instruct anyone to "request a refund of taxes paid in prior years." *Raymond* at 807. Nor does Petitioners' material suggest, much less provide instructions to individual tax payers "on how to complete future tax returns to reflect that the purchaser has not incurred any tax liability in the previous year and consequently does not owe any federal income or social security taxes." *Raymond* at 807. Nor does Petitioners' material suggest or instruct individual tax payers to "cease paying federal taxes after completing the instructions provided in the Program materials." *Raymond* at 807. The District Court's Decision reads, "The obvious claimed benefit from participating in Defendants' plan is that individual income taxes need not be paid." (Order at 10). This is unsubstantiated and false. The Petitioners' material claims no such tax benefit. The only claimed benefit to an individual using Petitioners' material could be the (legal) cessation of *withholding* of pay by his company, no more, no less. Indeed, the Forms that provide the legal basis for executing such request are the key elements of Speech the United States complains of. Petitioners' material in no way counsels the individual regarding the use of his money nor how to handle his (alleged) ultimate liability for filing and payment of income taxes. Whether that individual does or does not use his money to intercede for Redress of constitutional torts and reestablishment of individual Rights is a personal choice, not counseled in the subject Educational Program, and no personal assistance has ever been given to effect such.

MATERIAL FACT IN GENUINE DISPUTE. Petitioners' Blue Folder has not harmed anyone. The District Court claims the material has the *potential* of putting individuals in harm's way, but *has* harmed the Government (Order at 15,16). Not only is there no evidence of harm to any individual, there is no evidence that the distribution of the Blue Folder has caused any company to stop withholding, much less evidence that the material has caused any individual to stop filing and paying the individual income tax. Other than an unsubstantiated declaration by Agent Gordon, there is no evidence that the Program is causing "insufficient payments to the Treasury" or "significantly increased efforts at collecting taxes" (Order at 15).

The United States (IRS Agent Gordon) deliberately misled the Court into believing that as a result of the distribution of the Blue Folder, 997 people "have not filed federal tax returns for a period of three years, which represents more than 2,991 unfiled tax returns" and that the estimated cost to the Government "attributable to filing substitutes for returns for the 2991 un-filed returns is $4,806,537 (asserted in the District Court Order at 15). There is absolutely no evidence in support such a claim. The claim is unsubstantiated and false.

The United States offers no evidence, none, in support of claim that somehow, as a consequence of their receipt of Petitioners' Blue Folder 997 people have gotten their companies to stop withholding and those 997 people then stopped filing and paying their taxes for three years. There are no facts in the record of this case

to support the notion that the distribution of Petitioners' Blue Folder on has resulted in the loss of any revenue to the United States, or that it as coast the IRS over $4 million to assess and collect taxes from anyone, much less 997 people.

Egregiously, the Court rejected and returned to Petitioners the documentary evidence Petitioners included in support of their motion for reconsideration – evidence that clearly showed the District Court's reliance on Agent Gordon's unsupported Declaration of harm to the Government was misplaced. (Appendix H herein).

MATERIAL FACT IN DISPUTE. Petitioners did not expect or want people to buy the Blue Folder and its material. (District Court Order at16). In fact, many thousands of paper copies of the materials were distributed for free by Petitioners, which is what Petitioners initially told the United States on March 15, 2003 would be the case. See Petitioners' Statement of Material Facts, Facts 2, 3, 4, 22, 23, 25, 26, 27, 48, 58 and 59. (Appendix Q). (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. Petitioners do not counsel "violations of the tax laws" or "improper filing of returns." (District Court Order at 18). See Petitioners' Statement of Material Facts, Facts 3, 5, 8,10, 20, 23, 24, 30, 34, 35, 36, 37,38, 40, 42, 43, 45, 46, 50, 51, 55, 56 and 62 (Appendix Q herein). (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. Petitioners' speech was never an integral part or a vehicle of any crime and never incited a crime. Imminent

lawless activity has never been a factor. (Order at 19). See Petitioners' Statement of Material Facts, Facts 3, 5, 8,10, 20, 23, 24, 30, 34, 35, 36, 37,38, 40, 42, 43, 45, 46, 50, 51, 55, 56 and 62 (Appendix Q herein) (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. Petitioners have never assisted in the filing of tax returns. (Order at 18). See Petitioners' Statement of Material Facts, Facts 3, 5, 8,10, 20, 23, 24, 30, 34, 35, 36, 37,38, 40, 42, 43, 45, 46, 50, 51, 55, 56 and 62 (Appendix Q, herein). (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. Petitioners have never urged the preparation or presentation of any false IRS forms. (Order at 19). See Petitioners' Statement of Material Facts, Facts 3, 5, 8,10, 20, 23, 24, 30, 34, 35, 36, 37,38, 40, 42, 43, 45, 46, 50, 51, 55, 56 and 62, and Statement at 15, 54 and 61. (Appendix Qherein). (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. Petitioners' Blue Folder and its content are not commercial speech much less false commercial speech. (Order at 20). See Petitioners' Statement of Material Facts, Facts 2, 3, 4, 22, 23, 25, 26, 27, 48, 58 and 59. (Appendix K herein). (Docket 21).

MATERIAL FACT IN GENUINE DISPUTE. The District Court wrote, "Although Defendant may sometimes give their materials away for free, they do solicit a donation for $20 for each packet of materials they provide." (Order at 20). This is false. The record clearly shows the situation to be the complete reverse of what the Court asserts. Many thousands of copies of the Blue Folder have been given

away completely for free, both in printed form and downloaded from Petitioners' website. From time to time, People who for one reason or another could not download the material would ask that the Blue Folder and its contents be copied and mailed to them, and a $20 donation was requested to partially cover the cost of doing so. However, the record of this case proves without a doubt that Petitioners' policy has always been that if a person would tell Petitioners he did not have the $20 the material was mailed to them anyway, free of charge. The record also shows that If Petitioners did not have the time to copy and mail the material the $20 donation was returned and the person was then notified of the fact. See Petitioners' Statement of Material Facts, Facts 2, 3, 4, and 22 (Appendix Q herein). (Docket 21).

The United States has not denied the compelling evidence included in Schulz Declaration #5, Exhibits A-M (Docket # 23), conclusively proving Petitioners did not commercialize the distribution of the Blue Folder or its contents, including video-taped recordings of a few of the 37 meetings where the Blue Folders were distributed free of charge. This is another significant material fact in genuine dispute requiring a trial.

MATERIAL FACT IN GENUINE DISPUTE. Imminent unlawful behavior has never been a factor in the distribution of the Blue Folder and its content. (Order at 20). This is obvious from the nature of the Forms in the Folders and their instructions. It is also obvious from the fact that the record of this case is void of any evidence that anyone acting on the content of the Blue Folders stopped withholding,

imminently or otherwise. The fact that someone may have sent material from the Blue Folder to the IRS in support of his belief that he does not have to pay taxes, as alleged by IRS Agent Gordon in his Declaration, is clearly an unintended consequence of Petitioners Petition for Redress regarding withholding. People send all kinds of materials to the IRS.

In affirming, "for substantially the same reasons," the Second Circuit accepted the District Court's findings that Petitioners' "illegal activities" were harming the recipients of his materials, by exposing them to criminal liability, as well as the United States, by depriving the Government of "required tax payments" and forcing it "to expend resources to collect the unpaid taxes."

However, neither the District Court nor the Second Circuit could have honestly found that numerous individuals had stopped paying their taxes as a result of Petitioners' statements. As Petitioners have previously argued, apart from anecdotal tales and stories, there is no evidence in the record in support of the assertion that the distribution of the material the Government is complaining about caused any entity to stop withholding a worker's earnings, much less caused any worker to stop paying taxes. Neither, of course, is there any evidence in the record in support of the assertion that the Government has had to expend resources to collect taxes that went unpaid as a consequence of the distribution of the subject materials.

MATERIAL FACT IN GENUINE DISPUTE. Turning to the issue of whether Petitioners' statements are false and fraudulent. In each and every case the individual statements the government is complaining about equate to individual, specific facts Petitioners *first* determined were *true*, *then* presented to the Government for a check on their truthfulness, *then* distributed them the public for free *after* the Government refused to respond. As the Record clearly shows, Petitioners' only motive was to encourage or "incite" private attorneys and accountants across the country to investigate the truth of the statements. The statements the Government is complaining about are specific, formal, narrowly-drawn, material facts in the form of questions – facts and questions that have *not* been addressed or answered by any court, government agency or academician, as the record of this case proves. Not one of the statements the Government is complaining about has been denied by the Government or the District Court. Instead, the Government and the Court have merely referred to the individual, specific facts and questions in the Blue Folder as "theories" that have been dismissed by the courts in one case or another. Specific statements of fact and questions are not "theories." A trial was required on this issue done.

FACT IN GENUINE DISPUTE. The Forms the Blue Folder do not mention the 16th Amendment. The Statement of Facts and Beliefs do not include any statements regarding the 16th Amendment or "liability" that have been rejected by the Courts. (Court Order at 10 and 16). See Petitioners' denials in their Statement of Material Facts, Fact 5, 6, 17,

41, 47 and 63. (Appendix Q). (Docket 21). Regarding the so-called "861" issue, see Petitioners' denials in their Statement of Material Facts, Facts 5, 14, 33, 41, 47 and 63. (Appendix Q). (Docket 21).

FACT IN GENUINE DISPUTE. Petitioners did not fail to rely on knowledgeable professionals (District Court Order at 11). See Petitioners' Statement of Material Facts, Facts 4 and 6. (Appendix Q herein). (Docket 21).

FACT IN GENUINE DISPUTE. Petitioners have not been litigating similar tax-related issues for a long time. (District Court Order, 11). Among the one hundred or more cases Schulz has litigated during the past twenty-nine years are two or three that dealt with local property taxes and misuse of state tax revenues. See Schulz Decl 3, Exh A, B. (Docket # 12).

FACT IN GENUINE DISPUTE. The Forms and Instructions in the Blue Folder do more than "encourage" people to have the material reviewed by "qualified legal counsel." (District Order at 12). See Petitioners' Statement of Material Facts, Facts 6, 7, 8, 9,12,16 and 19. See especially Fact #12. (Appendix Q). (Docket 21).

FACT IN GENUINE DISPUTE. Petitioners have never, ever said the tax laws are unconstitutional. (District Court Order at 17). See Petitioners' Statement of Material Facts, Facts 31, 39. (Appendix Q herein). (Docket 21).

FACT IN GENUINE DISPUTE. Petitioners' "main purpose" is not "to continue to disseminate the Educational Program and encourage employees and employers alike to participate." (Order at 17). The subject Program is an insignificant part of Petitioners' overall plans and activities. See Petitioners' Statement of Material Facts, Facts 1, 19 and 44 (Appendix Q, herein). (Docket 21). See also Schulz Declaration #3, Exhibit E (Docket # 12).

FACT IN GENUINE DISPUTE. Petitioners have not knowingly made any false statements as part of any scheme to defraud. Regarding the 16th Amendment, see Defendants' denials in the Statement of Material Facts, Facts 5, 6, 17, 41, 47 and 63. Regarding the so-called "861" issue, see Defendants' denials in the Statement of Material Facts, Facts 5, 14, 33, 41, 47 and 63. (Appendix Q herein). (Docket 21).

FACT IN GENUINE DISPUTE. As clearly shown in the Blue Folder itself and argued in the pleadings, Petitioners most certainly did not "offer to sell a customized legal opinion letter from an attorney or CPA." (Order at 20). An online link to the material had always stated, word for word, "Click Here to request information about ordering a customized legal opinion letter from an attorney or CPA to be sent to your company or their tax and/or legal advisors. (Note: WTP is not involved with the creation or solicitation of these letters. WTP receives NO portion of their cost. Special discounts are available for WTP Congress members.)"

The "Click Here" link always brought up the email form and address of Preferred Services, the

organization that prepared and copyrighted the forms. The party interested in having an attorney or CPA provide an opinion on the contents of the Forms in the Blue Folder always dealt directly with Preferred Services. The message says Preferred Services offers a discount from its normal fee for such opinion letters to the person requesting a letter. This means whatever money traveled from the person requesting the letter to Preferred Services was reduced by some amount. Petitioners are not, and have never been, involved in any manner in the transaction. The offer by Preferred Services and any follow up transaction between Preferred Services and the person requesting a legal opinion letter does not turn the Blue Folder and its contents into commercial speech. The licensed attorneys that prepare(d) such letters for Preferred Services, including Paul Chappell, an attorney who retired from the IRS's Office of the Chief Counsel, also reviewed, and formally approved the detailed content of the subject Forms that were included in the Blue Folders that were distributed by Petitioners.

C. FEDERAL JURISDICTION IN DISTRICT COURT

The U.S. District Court for the Northern District of New York, had jurisdiction under 28 U.S.C. Section 1331.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court, by sanctioning a summary judgment that was granted without a trial, where there are facts material to the case that were in genuine dispute.

The United States is entitled to its arguments but not to its version of the facts.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party if there is a "genuine" dispute as to those facts. "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Petitioners and the United States tell two different stories regarding such material facts as the gravity of any harm to the public fisc, the commercial nature of the challenged speech, the truth of the speech and whether the material incited anyone to break the law, imminently or otherwise. The United States' version of the facts is so blatantly contradicted by the record that no reasonable jury could believe it. The District Court abused its discretion by adopting the United States' version of the facts for purposes of granting the United States' a motion for summary judgment.

Petitioners provided sufficient evidence to be entitled to a trial. Only a trial could possibly get to the truth. "It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-289.

Petitioners have done more than simply show that there is some "metaphysical" doubt as to the material facts. The record of this case, taken as a whole, could lead a rational trier of fact to find for Petitioners. Therefore, there are genuine issues for trial. See Scott v. Harris, 127 S. Ct. 1769, 1776 (2007).

Reasonable minds could differ as to the import of the evidence here. Therefore, summary judgment in this case, like that of a verdict, should not have

been "directed." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986).

From a reading of the Decision and Order, and a review of the proceedings of the case, it is clear the District Court judge was either arbitrary and capricious or he abused his discretion by, in effect, deciding there was no genuine issues for trial. Denying Petitioners the benefit of a full adversarial proceeding with discovery, witnesses and a hearing, the judge weighed the evidence determining, himself, the "truth", notwithstanding the presence of numerous facts material to the case that were in genuine dispute requiring a trial. This was a violation of Rule 56c and a violation of Due Process. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id at 249.

"There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id at 250.

As shown above under Statement of the Facts, there are numerous facts material to this case in genuine dispute. All that was required for Petitioners to be entitled to a full adversarial proceeding and trial was a genuine dispute over **any** one of the material facts. "Under Rule 56,

district court litigants opposing summary judgment have a right to a trial whenever there exists a 'genuine issue as to any material fact.'" Agosto v. Immigration & Naturalization Serv., 436 U.S. 748, 754 (1978).

The Court of Appeals affirmed the District Court's summary judgment "for substantially the same reasons." If the District Court erred in granting summary judgment based on its assessment of the credibility of the evidence before it, the Court of Appeals erred in affirming, without a de novo review, based on its assessment of the credibility of the evidence. "[J]ust as a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented, see *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467-468 (1962); 6 J. Moore, Federal Practice para. 56.02 [10], p. 56-45 (2d ed. 1976), so too a court of appeals is not at liberty to deny an individual a *de novo* hearing on his claim ... because of the court's assessment of the credibility of the evidence" Agosto v. Immigration & Naturalization Serv., 436 U.S. 748, 756-7 (1978).

In sum, the District Court based its findings on its review of "dueling affidavits" that clearly placed numerous material facts in genuine dispute, not the least of which is whether the Petitioners' speech incited any lawless activity, whether it was commercial speech, whether it was false commercial speech, and whether the United States of America or its citizens had suffered any harm due to the distribution of that speech.

A hearing or a trial is required to get to the truth of the material facts that are in genuine dispute.

B. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power.

In a denial of Petitioners' Due Process Rights, the merits panel at the Second Circuit showed extreme bias and prejudice toward Petitioners during oral argument (see transcript at Appendix R herein), and then in denying Petitioner's motion to include the transcript of the oral argument in Petitioners' petition for *en banc* rehearing (Appendix S).

The Panel showed bias by appearing as prosecuting attorney and cooperating with the Executive in a collective decision to deny Schulz his constitutional Right to Due Process. As clearly documented by the transcript, the Panel ignored the potent facts and arguments raised in the appeal before it; the Panel would not allow those issues to be argued – by either side.

The Panel exhibited significant prejudice and bias against Schulz, presumably characterizing Schulz as a political nuisance -- a problematic heretic who persistently preaches against the established orthodoxy by daring to openly

question the constitutionality of the application of the internal revenue laws.

The transcript clearly shows that by its comments the Panel harbored deep prejudice and bias against Schulz.

The two appellate judges present on the bench exhibited impatience and frustration. Unable to discredit Petitioners' legal arguments and the array of exculpable evidence Petitioners so meticulously presented in the District Court in twelve sworn Declarations, the appellate Judges grilled Schulz on matters that had nothing to do with the case before them, including how much and where he gets his money from and whether he pays taxes on it. Completely unprovoked, and without ever identifying any criminal code that had been violated, Judge Newman personally attacked and questioned Schulz. He persistently urged (to the point of "instructing") the appearing DOJ attorney to criminally prosecute Schulz. Under persistent verbal pressure from Judge Newman (a former United States Attorney from Connecticut) the DOJ attorney finally agreed in open court to meet with his client (IRS) for the purpose of pursuing a criminal action against Schulz. The DOJ attorney was obviously surprised and unprepared to discuss this. The transcript shows he, too, was cut off when attempting to argue the issues of the instant case.

Judge Newman appeared to be attempting to create a criminal cause of action against Schulz who interrogated as though he was a criminal

defendant in Judge Newman's courtroom. Judge Newman then ridiculed DOJ for bringing the civil case, even after DOJ admitted to Judge Newman that its client (IRS) had purposely decided not to pursue a criminal case, presumably because Schulz had not committed any crime. Neither the instant civil Complaint nor the subsequent record of the case includes any hint or evidence of criminal behavior.

"It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause." Marbury v. Madison, 5 U.S. 137, 175.

The conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a not unreasonable conclusion that the Panel's ability to carry out its judicial responsibilities with integrity, impartiality, and competence was impaired.

After receiving assurance from the DOJ that it would consider pursuing a criminal action the Panel affirmed the Summary Judgment, basing its terse ruling on "substantially the reasons set forth in the district court's decision."

In a further call for this Court's supervisory power, the District Court referred in its Summary Judgment to a Declaration by IRS Agent Gordon as evidence that Petitioners' speech was causing harm to the United States, but when confronted with evidence attached to Petitioners' motion for reconsideration that appeared to completely undermine Agent

Gordon's testimony, the Court directed the Clerk to return the evidence to Petitioners and to keep it out of the record. The evidence proved Gordon's Declaration to be misleading and false. Gordon had declared that 997 (unidentified) people failed to file and pay their individual income taxes for each of three years, costing the United States over $4 million to prepare 2,291 substitutes for return, implying that that was a result of the distribution of Petitioners' speech on withholding – i.e., the Blue Folder. Petitioners' evidence showed the District Court was clearly wrong to link Petitioners' Blue Folder to Gordon's Declaration. Egregiously, the District Court expunged the evidence from the record and did not change the Summary Judgment. (Appendix O herein).

In addition, in yet another call for this Court's supervisory power, the District Court showed its bias and prejudice against Petitioners by denying their motion for leave to file a Sur-Reply to address an argument the United States advanced for the first time in its Reply to Petitioners' opposition to the motion for summary judgment. (Appendix N herein).

In a denial of Petitioners' Due Process Rights, the Second Circuit affirmed the District Court's violation of Rule 56 c. Before the Circuit Court were numerous facts that are material to the case that are in genuine dispute. The Second Circuit failed to undertake a *de novo* review of the facts of the case, especially in light of the strength and aggressiveness of Petitioners' Rule 56 c argument and their supporting evidence.

C. Rule 41(c) of the Federal Rules of Appellate Procedure provides an automatic stay of the enforcement of an opinion and order of a Court of Appeals, until such time as that Court issues the Mandate.

The Notes of Advisory Committee on 1998 amendments to Rule 41(c) of the Federal Rules of Appellate Procedure read as follows:

> *Note to Subdivision (c).* Subdivision (c) is new. It provides that the mandate is effective when the court issues it. A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed.

The Mandate finalizing the Second Circuits February 22, 2008 Opinion and Order was not issued until August 27, 2008. See Appendix T herein.

On April 7, 2008, Petitioners filed a timely Petition for en banc rehearing of the Second Circuit's February 22, 2008 opinion and order that affirmed summary judgment and vacated the stay of enforcement of paragraph c of the summary judgment. At the same time, in an abundance of caution – i.e., in case Petitioners' had overlooked something in their interpretation of Fed. Rules of Appellate Procedure Rule 41(c) -- Petitioners filed a motion with the Second Circuit for a stay of enforcement of paragraph c.

Later that same day, the United States filed a motion for Contempt against Petitioners (for not complying with the requirements of paragraph c of the summary judgment).

On April 28, 2008, the District Court granted the motion for contempt. (Appendix D herein), in apparent violation of Fed. Rules of Appellate Procedure Rule 41(c), there being no Mandate by the Second Circuit of the February 22, 2008 Opinion and Order until August 27, 2008 (Appendix T herein).

Either an automatic stay was in place on April 28, 2008 under Rule 41(c), absent the Mandate, or a stay was pending following Petitioners' filing of (precautionary) motion for a stay pending the completion of the appeals process, first with the Second Circuit on April 7, 2008 (denied on April 24, 2008), and then with the Supreme Court of the United States on May 2, 2008 (denied on May 5, 2008).

Alternatively, the District Court abused its discretion given Petitioners' good faith efforts in exhausting what they believed to be their judicial remedies. See Statement of the Case, above.

Petitioners acted in good faith. They have not acted vexatiously, wantonly, or for oppressive reasons. They had good and fair reason to believe there was merit in fact and in law underpinning their litigation. They have never acted to harass or delay, much less with malice. They believe in exhausting their legitimate judicial remedies. They

have not acted with reckless disregard for the truth or the law.

Petitioners studied the plain language, the history, notes and the case law related to F.R.A.P. Rule 41. They had good and fair reason to believe that because no FRAP Rule 41 Mandate had issued, the February 22 decision by the Second Circuit affirming *paragraph "c"* and vacating the stay of enforcement of *paragraph "c"* was not final and would not be final until after a determination of the Petition for En Banc Rehearing, which was timely filed by on April 7, 2008.

In other words, Petitioners had good and fair reason to believe an automatic stay of enforcement of paragraph "c" of the Injunction Order was in effect.

Petitioners had good reason to believe the Second Circuit's September 20, 2007 stay of paragraph "c" pending appeal (Appendix Q herein) was inextricably intertwined with the appeal from paragraph "c," not to be separated until the Mandate issued, finalizing the judgment.

Petitioners had good reason to believe the two issues (the stay of *paragraph "c"* and the appeal of *paragraph "c"*) were not, and could not be cleaved in two by the Second Circuit's February 22, 2008 decision until the Mandate issued.

If the finality of the Second Circuit's February 22, 2008 decision was pending the issuance of the Mandate that, in turn, was pending the determination of the Petition for En Banc hearing, it

was reasonable for Petitioners to assume the finality of the Court's decision to lift the stay was also pending the issuance of the Mandate and the determination of the Petition for the rehearing.

The District Court's reliance on the cases cited on pages 3-4 of the Contempt Order (Appendix D herein) is misplaced. Those cases are inapposite. Here, unlike those cases, a stay pending appeal was granted by the Court of Appeals, and the Order that simultaneously affirmed paragraph "c" of the Injunction Order and vacated the stay of enforcement of paragraph "c" would not be finalized until a mandate issued under Rule 41. Here, unlike the cases cited by the District Court, the mandate stayed is the mandate on appeal. Whether Petitioners are required to comply with paragraph "c" of the District Court's Injunction Order is, in fact, the heart of the matter "involved in the appeal."

Petitioners argue the 2nd Circuit was merely recognizing, and stating its compliance with the requirements of Rule 41 when it said in U.S. v. Pepin, 514 F.3d 193, 209, "the order of this Court staying the trial is vacated effective upon issuance of the mandate," and when it said in Chase v. Turner, 964 F.2d 159, 166, "Pending issuance of the mandate, we stay the order, effective forthwith," and when it said in Oliver v. Vincent, 498 F.2d 340, 346, "Effective upon the filing of the mandate the stay heretofore granted is vacated and the order of the district court is affirmed."

D. The free public distribution of copies of a Petition to the Government for Redress of Grievances, which the Government refused to respond to, and which speech neither advocates nor incites lawless behavior, imminent or otherwise, is protected from retaliation by the Speech, Assembly and Petition clauses of the First Amendment and by the Ninth Amendment to the United States Constitution.

The District Court rejected Petitioners' argument that their activities were protected by the First Amendment. (District Court Order, at 17 – 23). (Appendix B herein). The court observed that false, misleading, and deceptive commercial speech could be enjoined, and it held that Petitioners' activities could be enjoined even if they were not commercial speech, because the First Amendment does not protect speech that incites imminent lawless action. (Order at 20 – 21.)

Petitioners' version of the facts prove Petitioners' speech was neither commercial not false. Nor did it incite any lawless action, imminent or otherwise. A reasonable jury would agree with Petitioners.

Petitioners' distribution of the subject Petition for Redress of a Grievance relating to the forced withholding by companies of a worker's pay is protected from retaliation by the First Amendment's Speech, Assembly and Petition clauses as well as by the Ninth Amendment. The

identities and contact information of those people who received a copy of the material is personal and private information protected by the Fourth Amendment's privacy clauses.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the opinion and orders of the Court of Appeals in this matter.[2]

Dated: September 4, 2008

Respectfully submitted,

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[2] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and that the matter be remanded to the Court of Appeals or the District Court for redetermination in light of this Court's opinions in First National Bank, supra, Liberty Lobby, supra, Agosto, supra, and Scott, supra.